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**IN THE
COURT OF APPEALS OF INDIANA**

TBA ENTERTAINMENT
CORPORATION,

Appellant-Defendant,

vs.

KARIN GLASS and
KENNETH GLASS,

Appellee-Plaintiffs.

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No. 49A05-0204-CV-0174

APPEAL FROM THE MARION SUPERIOR COURT

The Honorable S.K. Reid, Judge
Cause No. 49D13-0111-CP-1917

December 18, 2002

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Karin and Kenneth Glass (the “Glasses”) filed suit against TBA Entertainment Corporation (“TBA”) for tax liabilities arising from a Stock Purchase Agreement (the “Agreement”) under which TBA purchased the Glasses’ stock in a number of companies.¹ TBA filed a Motion to Stay Proceedings and Compel Arbitration in the trial court. The trial court denied TBA’s motion and found that the Glasses’ excess tax and penalty liabilities were \$145,207.00 because TBA failed to dispute the Glasses’ claim pursuant to the Agreement. TBA now appeals the trial court’s denial of their motion. We reverse and remand.

Issues

TBA raises two issues for our review, of which we find the following dispositive: whether the trial court erred in denying TBA’s Motion to Stay Proceedings and Compel Arbitration.²

Facts and Procedural History

On or about March 18, 1999, the Glasses and TBA entered into a Stock Purchase Agreement (the “Agreement”) pursuant to which TBA purchased the Glasses’ stock in a number of companies. At the time of contracting, the parties elected to treat the stock purchase as a “qualified stock purchase” under Section 338(h)(10) of the Internal Revenue Code. Such an election benefited TBA, but also resulted in the Glasses suffering state and federal tax liabilities greater than if the stock purchase was not made in accordance with

¹ We heard oral argument on this case on November 14, 2002, at the University of Indianapolis. We thank the attorneys for their capable advocacy and the students and faculty for their gracious reception.

² TBA also raises the issue of whether the trial court erred in considering the merits of the case when denying the Motion to Compel Arbitration, but this issue is moot as we are reversing the decision of the trial

Section 338(h)(10). Therefore, the parties agreed that Section 6.5 of the Agreement would indemnify the Glasses for their combined state and federal income tax liability incurred as a result of the election. Section 6.5 states:

TBA and the [Glasses] shall jointly elect to treat the Acquisition as a “qualified stock purchase” within the meaning of Section 338 of the Code and shall timely prepare and file with the Internal Revenue Service a Section 338(h)(10) election on Form 8023. TBA indemnifies the [Glasses] for the amount by which the [Glasses’] combined state and federal income tax liability arising as a result of the sale of the Shares in accordance with the Section 338(h)(10) election exceeds the combined state and federal income tax liability the [Glasses] would have incurred had TBA and the [Glasses] not filed the Section 338(h)(10) election. Any payment due by TBA to the [Glasses] hereunder shall be paid within thirty (30) days following the agreement of the parties hereto as to the amount of indemnification payment payable hereunder. Should the parties disagree with respect to such calculation, such dispute shall be resolved in accordance with the arbitration procedures set forth in Section 8.1(d)(iii).

Appellant’s Appendix at 112.

Section 8.1(d)(iii) of the Agreement states:

If TBA and the [Glasses] cannot reach an agreement with respect to any claim for indemnification under this Article 8 (an “Indemnification Dispute”), such Indemnification Dispute shall be resolved by arbitration. All Indemnification Disputes shall be presented in Indianapolis, Indiana to an arbitrator selected by mutual agreement of TBA and the [Glasses] from impartial arbitrators familiar with the nature of the Indemnification Dispute. The decision of the arbitrator shall be binding on TBA and the [Glasses]. The expenses of such arbitration shall be allocated by the arbitrator.

Appellant’s Appendix at 117.

On or about August 22, 2001, the Glasses submitted a demand to TBA for reimbursement of tax liabilities they attributed to the Section 338 election. TBA did not

respond to this demand. On or about October 26, 2001, the Glasses made a second demand to TBA for tax reimbursement. TBA responded that the Glasses had not supplied sufficient information and documentation to verify the accuracy of the demand. On or about November 20, 2001, the Glasses provided the information TBA requested to verify the tax reimbursement. Subsequent to November 21, 2001, TBA informed the Glasses of a proposed date by which TBA would respond, but disputed the inclusion of attorneys' fees and accounting fees into the tax liability demand.

On November 29, 2001, the Glasses filed suit against TBA, seeking reimbursement and arguing that the demand has become a conclusive liability of TBA's because TBA failed to respond within thirty days of the demand. TBA states that no agreement has yet been reached on the existence or amount of any tax reimbursement TBA may owe the Glasses. TBA asserts that it has not stated that it would not pay the reimbursement, just that the amount has not yet been proven. However, the Glasses assert that the excess taxes totaled \$145,207.00. Additionally, the Glasses state that TBA's delinquent filing of certain corporate tax returns has resulted in penalties and interest against the Glasses in the amount of \$213,476.50.

On January 31, 2002, without filing an answer to the Glasses' Complaint, TBA filed a Motion to Stay Proceedings and Compel Arbitration. The trial court denied the motion, finding that Section 8.1(d)(ii) of the Agreement controlled. Section 8.1(d)(ii) of the Agreement provides for indemnification of the excess tax in the amount requested if the Claim Notice was not disputed within thirty days:

In the event any party to this Agreement should have a claim pursuant to this Section 8.1 against any other party to this Agreement . . . such party shall send a Claim Notice with respect

to such claim to the party from whom indemnification is sought. If the party from whom indemnification is sought does not notify the party requesting indemnification within thirty (30) days of receipt of the Claim Notice that the party from whom indemnification is sought disputes such claim, the amount of such claim will be conclusively deemed a liability of the party from whom indemnification was sought hereunder.

Appellant's Appendix at 117. Section 8.1(b) states that TBA agrees to indemnify the Glasses for losses resulting from:

- (i) any inaccuracy in any representation or warranty by TBA made or contained in this Agreement or in connection herewith;
- (ii) any failure of TBA to perform any covenant or agreement made or contained in this Agreement or fulfill any other obligation in respect hereof; and
- (iii) the operation of the Acquired Companies by TBA following the Closing Date, except to the extent such Losses constitute Losses for which the [Glasses] are required to indemnify TBA Indemnitees under Section 8.1(a).

Appellant's Appendix at 115.

The trial court found that, because TBA did not dispute the calculation of the tax liability within thirty days of receiving notice of the Glasses' claim, the amount of the request is conclusively deemed a liability of TBA and arbitration to resolve an "Indemnification Dispute" was unnecessary. Thus, the trial court entered an Order Denying [TBA]'s Motion to Stay Proceedings and Compel Arbitration. TBA now appeals.

Discussion and Decision

I. Standard of Review

It appears from the record that the trial court entered findings of fact sua sponte. The standard of review for findings of fact and conclusions thereon issued pursuant to Indiana Trial Rule 52(A) is one of great deference. Reed Sign Serv., Inc. v. Reid, 755 N.E.2d 690,

694 (Ind. Ct. App. 2001), trans. denied. In reviewing the judgment, the court must first determine whether the evidence supports the findings of fact and then whether the findings support the judgment. Id. The court will not set aside a judgment unless it is clearly erroneous. Id. A judgment is clearly erroneous only if a review of the record leaves the court with a firm conviction that a mistake has been made. Id. at 694-95. The court may affirm the judgment on any legal theory supported by the findings. Id. at 695.

In reviewing a motion to stay proceedings, we apply an abuse of discretion standard of review. In re Involuntary Termination of Parent-Child Relationship of A.K., 755 N.E.2d 1090, 1098 (Ind. Ct. App. 2001). An abuse of discretion is found only when the trial court's action is clearly erroneous, against the logic and effect of the facts before it and the inferences which may be drawn from it. Id.

II. TBA's Motion to Stay Proceedings

TBA argues that the parties agreed to arbitrate reimbursement disputes and that the trial court's order ignores the express terms of the Agreement. TBA states that the express language of the Agreement evidences the intent of the parties to arbitrate their reimbursement disputes and the trial court erroneously determined that the Agreement's general liquidation provision applied to the Glasses' claim for tax reimbursement.

In contract interpretation, the more specific provision controls over the more general. See Bowling v. Poole, 756 N.E.2d 983, 990 (Ind. Ct. App. 2001). TBA asserts that Section 6.5 is more specific than the Agreement's general indemnity provision and is therefore, controlling. Section 6.5 of the Agreement states in part:

Any payment due to the [Glasses] hereunder shall be paid within thirty (30) days following the agreement of the parties hereto as to the amount of the indemnification payment payable

hereunder. Should the parties disagree with respect to such calculation [of tax reimbursement], such dispute shall be resolved in accordance with the arbitration procedures set forth in Section 8.1(d)(iii).

TBA argues that Section 6.5 of the Agreement trumps all other sections as to the liability for tax reimbursement and incorporates only the arbitration procedure set forth in Section 8.1(d)(iii). Because the parties did not agree on the amount of tax reimbursement TBA owed the Glasses, TBA contends the only recourse under the Agreement is arbitration. Therefore, TBA contends that the trial court erred in denying their Motion to Stay Proceedings and Compel Arbitration. We agree.

Section 6.5 could as easily direct us to Section 8.1(d)(ii) as it does to Section 8.1(d)(iii). If it had, then the Glasses would be correct – if neither payment nor notice of a dispute was made within thirty days, then the reimbursement demand would become a conclusive liability for TBA under Section 8.1(d)(ii) and if the amount was merely disputed, then arbitration would be necessary to resolve the dispute under Section 8.1(d)(iii).

However, Section 6.5 does not read this way. Rather, it states merely that any payment due to the Glasses shall be paid within thirty days following the agreement of the parties. This is not the same as stating that the amount becomes a conclusive liability after thirty days. Rather, the contract is distinguishing between an agreement and a disagreement regarding the amount owed.

The distinction becomes more clear when you consider what would happen if TBA had refused to pay the amount agreed upon. If TBA had responded to the demands for payment and, instead of requesting more information, refused to pay an amount agreed upon, then Section 8.1(d)(ii) would apply. Such refusal to pay would violate Section 8.1(b)(ii) and

that would lead directly to Section 8.1(d)(ii) where the amount would become a conclusive liability for TBA. Certainly such refusal to pay would not lead to arbitration because there would be nothing left to arbitrate as the amount of the liability would have been agreed upon.

The situation before us is distinguishable from that situation, however. Here, TBA replied requesting more information regarding the amount which the Glasses stated was owed. This in no way violates any of the provisions laid out in Section 8.1(b). Although TBA did not contact the Glasses to respond to the first demand letter, such silence does not constitute an agreement nor does it constitute a breach of any covenant of the contract. TBA does not dispute they may owe interest and other money because of the delay in payment; they merely requested more information to independently ascertain the amount owed and to determine if they disputed the amount owed and that such amount would need to go to arbitration.

The Glasses direct this court to Section 8.1(d)(ii) which they assert unambiguously provides that a party seeking indemnification for any reason from another party pursuant to the Agreement must send a Claim Notice requesting indemnification. If the amounts claimed and indemnification sought are not disputed within thirty days, the “amount of such claim will be conclusively deemed a liability of the party from whom indemnification was sought....” Section 8.1(d)(ii). The Glasses contend that they followed Section 8.1(d)(ii) when they sent a Claim Notice on August 22, 2001, regarding the tax reimbursement. Because TBA did not dispute the claim within thirty days, the Glasses contend that the amount is now a conclusive liability of TBA. However, Section 8.1(d)(ii) only applied to the three specific claims outlined in Section 8.1. (“In the event any party to this Agreement should have a claim pursuant to this Section 8.1 against any other party to this Agreement...”).

The Glasses have not claimed that TBA has breached any of the covenants of the contract.

The trial court found that Section 8.1(d)(ii) is unambiguously intended to avoid arbitration unless its terms are followed. Because TBA failed to dispute the calculation of the tax reimbursement within thirty days of receiving the Glasses' demand, the trial court found that the amount became a conclusive liability for TBA pursuant to Section 8.1(d)(ii) and there is no dispute to arbitrate pursuant to other Sections of the Agreement. We disagree.

Section 8.1(d)(ii) only applies to the claims listed in Section 8.1 and therefore, the trial court should not have applied Section 8.1(d)(ii) to the Glasses' claim for tax reimbursement, which is addressed separately and specifically by Section 6.5. TBA has not failed to perform any covenant or agreement or fulfill any other obligation because the Agreement requires TBA to pay the Glasses only upon the parties reaching an agreement as to the amount of tax reimbursement or upon an order from an arbitrator. As the parties have never agreed to an amount and no arbitrator has ordered payment, TBA has not failed to perform under Section 8.1.

The Glasses sent a demand to TBA, but the first demand cannot be considered a Claim Notice as TBA had not yet breached any covenant of the contract. TBA responded to the second demand by requesting more information, but the Glasses already believed the amount was a conclusive liability.

Because TBA had not breached any covenant of the contract, the Glasses' demand letters did not activate Section 8.1(d)(ii) and therefore, the demand never became a conclusive liability for TBA. Therefore, the trial court should have granted TBA's Motion to Stay Proceedings and Compel Arbitration.

Conclusion

Because TBA has not breached any covenant of the contract, the Glasses' demands for tax reimbursement did not become a conclusive liability for TBA pursuant to Section 8.1(d)(ii). Section 6.5 of the Agreement requires disputes over the amount of tax reimbursement owed be submitted to arbitration. Therefore, the trial court erred in denying TBA's Motion to Stay Proceedings and Compel Arbitration.³

Reversed and remanded for further proceedings consistent with this opinion.

RILEY, J., and BAILEY, J., concur.

³ Moreover, the law favors the bargained for use of arbitrator provisions in contracts. Assuming without conceding the provision in question is ambiguous and subject to alternative interpretations, the public policy in favor of these types of provisions dictates the reversal of the trial court's decision.